

AMENDED IN SENATE MARCH 18, 2003

SENATE BILL

No. 12

Introduced by Senator Bowen

*(Coauthors: Senators Ducheny, Kuehl, Machado, Ortiz, Perata,
Romero, Scott, Soto, Torlakson, and Vasconcellos)*

*(Coauthors: Assembly Members Chan, Hancock, Jackson, Leslie,
Longville, Nation, Pavley, and Vargas)*

December 2, 2002

An act to add Article 1.8 (commencing with Section 17529) to Chapter 1 of Part 3 of Division 7 of, and to repeal Section 17538.4 of, the Business and Professions Code, relating to advertising.

LEGISLATIVE COUNSEL'S DIGEST

SB 12, as amended, Bowen. Electronic mail advertising.

Existing law prohibits a person or entity conducting business in the state from e-mailing or causing to be e-mailed documents consisting of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit unless that person or entity establishes a toll-free telephone number or valid sender operated return e-mail address that a recipient may contact to notify the sender not to e-mail the recipient any further unsolicited documents. Existing law requires that notification of the toll-free telephone number, and a valid address that a recipient may write to, be included on all unsolicited e-mailed documents, as specified, and prohibits the e-mailing of any unsolicited documents to a person who has requested not to receive any further unsolicited documents. Existing law requires unsolicited e-mail advertisements to contain a heading of "ADV:" or "ADV:ADLT," as specified.

This bill would ~~remove~~ *delete* these provisions and would instead prohibit ~~the sending, as defined, of a person or entity from initiating an unsolicited commercial e-mail advertisements~~ *advertisement either from California or to a California electronic mail address. The bill would provide that if any part of these provisions or their application are held invalid, the invalidity shall not effect the other provisions or applications that can still be given effect. The bill would also make it unlawful for a person to sell or provide a list of e-mail addresses to be used to initiate the transmission of unsolicited commercial e-mail advertisements from California or to a California e-mail address.*

This bill would also ~~provide that if any of the above provisions or applications are held invalid, alternative provisions would become effective. The alternative provisions would require the sender of an unsolicited commercial e-mail advertisement to maintain a functioning return e-mail address for requests not to receive further advertisements; and would also require the advertisement to include specified notification regarding making such a request. The alternative provisions would also prohibit a person from initiating transmission of an unsolicited a commercial e-mail advertisement either from California or to a California e-mail address in certain circumstances. The alternative provisions would require that a commercial e-mail advertisement include “ADV:” or “ADV:ADLT” in the title of the e-mail, depending on the content of the advertisement. The alternative provisions would make it unlawful for a person to sell or provide a list of e-mail addresses to be used to initiate the transmission of unsolicited commercial e-mail advertisements from California or to a California e-mail address where the advertisement (1) contains or is accompanied by a 3rd party’s domain name without permission, (2) contains or is accompanied by falsified, misrepresented, obscured, or forged header information, or (3) has a misleading subject line.~~

This bill would authorize the recipient of a commercial e-mail advertisement transmitted in violation of any of these provisions to bring an action to recover the greater of actual damages or \$500 per individual violation, and reasonable costs and attorney’s fees. *The bill would also impose a civil penalty of \$250 for each individual violation, to be paid to the High Technology Theft Apprehension and Prosecution Program Trust Fund.* The bill would authorize the court to increase the award to up to triple this amount if the violation was willful or knowing. The bill would provide that any cause of action in existence prior to its



enactment would not be affected by the act and would be governed by the law in effect at the time it arose.

Existing law prohibits a registered user of an electronic mail service provider, as defined, from using or causing to be used the provider's equipment located in this state in violation of the provider's policy prohibiting or restricting the use of its equipment for the initiation of unsolicited electronic mail advertisements. Existing law prohibits an individual, corporation, or other entity from using or causing to be used, by initiating an unsolicited electronic mail advertisement, an electronic mail service provider's equipment located in this state in violation of the provider's policy prohibiting or restricting the use of its equipment to deliver unsolicited electronic mail advertisements to its registered users. Existing law authorizes an electronic mail service provider whose policy is violated to bring a civil action to recover specified damages, but requires the provider to establish as an element of the cause of action that the defendant had actual notice, prior to the violation, of the provider's policy and that the advertisements would use or cause to be used the provider's equipment located in this state.

This bill would delete the above prohibitions and instead prohibit a person who has been given notice by an e-mail service provider of its policies regarding unsolicited commercial e-mail advertisement from using a computer, computer network, or the computer services of the provider to initiate the transmission of an unsolicited commercial e-mail advertisement from California or to a California e-mail address in contravention of those policies. The bill would also delete the requirement that a provider bringing an action for a violation of its policies establish that the defendant had actual notice, prior to the violation, of the provider's policies and that the advertisements would use or cause to be used the provider's equipment located in this state.

A violation of the provisions governing advertising is a misdemeanor. Because a violation of the provisions of this bill would be a crime, the bill would create a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.



The people of the State of California do enact as follows:

SECTION 1. Article 1.8 (commencing with Section 17529) is added to Chapter 1 of Part 3 of Division 7 of the Business and Professions Code, to read:

Article 1.8. Restrictions on Unsolicited Commercial E-Mail
Advertisement

17529. For the purpose of this title, the following definitions apply:

(a) “California electronic mail address” means any of the following:

(1) An electronic mail address furnished by an electronic mail service provider that sends bills for furnishing and maintaining that electronic mail address to a mailing address in this state.

(2) An electronic mail address ordinarily accessed from a computer located in this state.

(3) An electronic mail address furnished to a resident of this state.

(b) “Commercial e-mail advertisement” means any electronic mail message initiated for the purpose of advertising or promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit.

(c) “Direct consent” means a recipient’s unambiguous expression of permission to receive a commercial e-mail advertisement of the type transmitted, where the recipient has clear and conspicuous notice of the scope of the permission, including the types of commercial e-mail advertisements and the senders or types of senders included, at the time the recipient grants that permission.

(d) “Domain name” means any alphanumeric designation that is registered with or assigned by any domain name registrar as part of an electronic address on the Internet.

(e) “Electronic mail” or “e-mail” means an electronic message that is *sent to an electronic mail address and* transmitted between two or more telecommunications devices, computers, or electronic devices capable of receiving electronic messages, whether or not the message is converted to hard copy format after receipt or is viewed upon transmission or stored for later retrieval.

1 “Electronic mail” or “*e-mail*” includes electronic messages that
2 are transmitted through a local, regional, or global computer
3 network.

4 (f) “Electronic mail address” means a destination, commonly
5 expressed as a string of characters, to which electronic mail can be
6 sent or delivered. An “electronic mail address” may include a user
7 name or mailbox and a reference to an Internet domain.

8 (g) “Electronic mail service provider” means any person,
9 including an Internet service provider, that is an intermediary in
10 sending or receiving electronic mail or that provides to end users
11 of the electronic mail service the ability to send or receive
12 electronic mail.

13 ~~(h) “Functioning return electronic mail address” means an~~
14 ~~electronic mail address displayed in a commercial e-mail~~
15 ~~advertisement that has the capacity to receive the number of reply~~
16 ~~messages that the sender of the commercial e-mail advertisement~~
17 ~~should reasonably expect to be transmitted by the recipients of the~~
18 ~~commercial e-mail advertisement for no less than 30 days after the~~
19 ~~sending of the commercial e-mail advertisement.~~

20 ~~(i)~~

21 (h) “Header information” means the source, destination, and
22 routing information attached to the beginning of an electronic mail
23 message, including the originating domain name and originating
24 electronic mail address.

25 ~~(j)~~

26 (i) “Initiate the transmission of a commercial e-mail
27 advertisement” means to transmit or cause to be transmitted a
28 commercial e-mail advertisement or assist in the transmission of
29 a commercial e-mail advertisement by providing ~~or selecting~~
30 electronic mail addresses to which the advertisement may be sent,
31 but does not include the *routine* transmission of the advertisement
32 through the network or system of a telecommunications utility or
33 an electronic mail service provider *through its network or system*.

34 ~~(k)~~

35 (j) “Internet” has the meaning set forth in paragraph (6) of
36 subdivision ~~(e)~~ (f) of Section 17538.

37 ~~(l)~~

38 (k) “Preexisting or current business relationship,” as used in
39 connection with the sending of a commercial e-mail
40 advertisement, means ~~either of the following:~~

~~(1) The recipient has purchased or leased property, goods, or services from the sender and both of the following conditions are met:~~

~~(A) The subject of the commercial e-mail advertisement concerns that purchase or lease.~~

~~(B) The commercial e-mail advertisement is sent within 12 months of the purchase or lease or within any longer express warranty period.~~

~~(2) The recipient has an ongoing contract with the sender and the commercial e-mail advertisement directly concerns the ongoing contract.~~

~~(m) that within the three-year period ending upon receipt of the advertisement, the recipient has made an inquiry, application, purchase, or transaction regarding products or services offered by the sender.~~

~~(l) “Recipient” means the addressee of a commercial e-mail advertisement authorized user of the electronic mail address to which the message was sent or delivered. If an addressee a recipient of a commercial e-mail advertisement has one or more electronic mail addresses to which a commercial e-mail advertisement is sent, the addressee recipient shall be deemed to be a separate recipient for each address to which the advertisement is sent.~~

~~(m) “Routine transmission” means the transmission, routing, relaying, handling, or storing of an electronic mail message through an automatic technical process.~~

~~(n) “Sender” means a person or entity who initiates the transmission of a commercial e-mail advertisement or whose product, service, or Internet Web site is advertised or promoted by the message.~~

~~(o) “Unsolicited commercial e-mail advertisement” means a commercial e-mail advertisement sent to a recipient who meets both of the following criteria:~~

~~(1) Has not provided direct consent to receive the commercial e-mail advertisement.~~

~~(2) Does not have a preexisting or current business relationship with the sender or offeror of the property, goods, or services.~~

~~17529.1. (a) Notwithstanding any other provision of law, no person or entity may do either of the following:~~

~~(1)~~

1 (a) Initiate an unsolicited commercial e-mail advertisement
2 from California.

3 ~~(2)~~

4 (b) Initiate an unsolicited commercial e-mail advertisement to
5 a California electronic mail address.

6 ~~(b) The provisions of this section are severable. If any~~
7 ~~provision of this section or its application is held invalid, both of~~
8 ~~the following shall occur:~~

9 ~~(1) That invalidity shall not affect any other provision or~~
10 ~~application that can be given effect without the invalid provision~~
11 ~~or application:~~

12 ~~(2) Sections 17529.2 and 17529.3 shall become operative.~~

13 ~~17529.2. (a) Any sender of unsolicited commercial e-mail~~
14 ~~advertisements either from California or to a California electronic~~
15 ~~mail address shall do all of the following:~~

16 ~~(1) Maintain a functioning return electronic mail address to~~
17 ~~which a recipient may send a reply indicating the recipient's desire~~
18 ~~not to receive further commercial e-mail advertisements from the~~
19 ~~sender at the electronic mail address at which the message was~~
20 ~~received.~~

21 ~~(2) Clearly and conspicuously disclose in the commercial~~
22 ~~e-mail advertisement all of the following:~~

23 ~~(A) The recipient's right to decline to receive further~~
24 ~~commercial e-mail advertisements at the electronic mail address~~
25 ~~at which the message was received.~~

26 ~~(B) The recipient's ability to decline to receive further~~
27 ~~commercial e-mail advertisements by sending a message to the~~
28 ~~sender's functioning return electronic mail address.~~

29 ~~(C) The sender's functioning return electronic mail address.~~

30 ~~(b)~~

31 ~~17529.2. It is unlawful for any person to initiate the~~
32 ~~transmission of an unsolicited a commercial e-mail advertisement~~
33 ~~either from California or to a California electronic mail address~~
34 ~~under any of the following circumstances:~~

35 ~~(1)~~

36 (a) The commercial e-mail advertisement contains or is
37 accompanied by a third party's domain name without permission
38 of the third party.

39 ~~(2)~~

1 (b) The commercial e-mail advertisement contains or is
2 accompanied by falsified, misrepresented, obscured, or forged
3 header information.

4 ~~(3)~~

5 (c) The commercial e-mail advertisement has a subject line that
6 has the capacity or tendency to mislead the public about the
7 contents of the advertisement.

8 ~~(4) The sender is in violation of subdivision (a) or the~~
9 ~~commercial e-mail advertisement does not contain the notice~~
10 ~~required by subdivision (a).~~

11 ~~(5) The potential recipient of the commercial e-mail~~
12 ~~advertisement or a recipient of a past commercial e-mail~~
13 ~~advertisement has informed the sender, by use of the functioning~~
14 ~~return electronic mail address or by other electronic or written~~
15 ~~means communicated to the sender, that the recipient does not wish~~
16 ~~to receive commercial e-mail advertisements at that electronic~~
17 ~~mail address.~~

18 ~~(6) An employer has informed the sender, as provided in~~
19 ~~subdivision (c), not to send further commercial e-mail~~
20 ~~advertisements to designated electronic mail addresses.~~

21 ~~(e) An employer who provides or has control over one or more~~
22 ~~electronic mail addresses used by its employees may notify the~~
23 ~~sender of an unsolicited commercial e-mail advertisement, by use~~
24 ~~of the functioning return electronic mail address or by other~~
25 ~~electronic or written means communicated to the sender, that no~~
26 ~~further commercial e-mail advertisements should be transmitted~~
27 ~~to any of the employer-provided and employer-controlled~~
28 ~~electronic mail addresses.~~

29 (d) In addition to the prohibitions described in subdivision (b),
30 it is unlawful for any person to initiate the transmission of an
31 unsolicited commercial e-mail advertisement from California or
32 to a California electronic mail address unless all of the following
33 conditions are satisfied:

34 (1) The subject line of the commercial e-mail advertisement
35 includes “ADV:” as the first four characters.

36 (2) If the commercial e-mail advertisement is intended for the
37 purpose of the lease, sale, rental, gift offer, or other disposition of
38 any property, goods, services, or extension of credit that may only
39 be viewed, purchased, rented, leased, or held in possession by an
40 individual 18 years of age or older, the subject line of the

1 commercial e-mail advertisement shall include “ADV:ADLT” as
2 the first eight characters.

3 ~~(c) This section shall remain inoperative until any provision of~~
4 ~~Section 17529.1 or its application is held invalid, at which time this~~
5 ~~section shall become operative.~~

6 17529.3. ~~(a)~~ It is unlawful for any person to sell or otherwise
7 provide a list of electronic mail addresses to be used *by a sender*
8 to do either of the following:

9 ~~(1)~~

10 (a) Initiate the transmission of unsolicited commercial e-mail
11 advertisements from California.

12 ~~(2)~~

13 (b) Initiate the transmission of unsolicited e-mail
14 advertisements to a California electronic mail address.

15 ~~(b) This section shall remain inoperative until any provision of~~
16 ~~Section 17529.1 or its application is held invalid, at which time this~~
17 ~~section shall become operative.~~

18 17529.4. (a) In addition to any other remedies provided by
19 this article or by other provisions of law, a recipient of a
20 commercial e-mail advertisement transmitted in violation of
21 Section 17529.1, 17529.2, or 17529.3 may bring an action to
22 recover either actual damages or five hundred dollars (\$500) for
23 each individual violation, whichever is greater, and may also
24 recover reasonable costs and attorney’s fees.

25 (b) If the court finds that the violation was willful or knowing,
26 the court may, in its discretion, increase the amount of the award
27 to an amount equal to not more than three times the amount
28 available under subdivision (a).

29 (c) *In addition to the award set forth in subdivisions (a) and (b),*
30 *a civil penalty of two hundred fifty dollars (\$250) shall be imposed*
31 *for each individual violation, to be paid to the High Technology*
32 *Theft Apprehension and Prosecution Program Trust Fund, which*
33 *may be expended by the Office of Criminal Justice and Planning*
34 *to fund programs to enhance the capacity of local law enforcement*
35 *and prosecutors to deter, investigate, and prosecute high*
36 *technology-related crimes.*

37 17529.9. The remedies provided for in this article are in
38 addition to, and not in lieu of, any other remedies provided for by
39 law.

1 SEC. 2. Section 17538.4 of the Business and Professions
2 Code is repealed.

3 SEC. 3. *Section 17538.45 of the Business and Professions*
4 *Code is amended to read:*

5 17538.45. (a) ~~For purposes of this section, the following~~
6 ~~words have the following meanings:~~

7 (1) ~~“Electronic mail advertisement” means any electronic~~
8 ~~mail message, the principal purpose of which is to promote,~~
9 ~~directly or indirectly, the sale or other distribution of goods or~~
10 ~~services to the recipient.~~

11 (2) ~~“Unsolicited electronic mail advertisement” means any~~
12 ~~electronic mail advertisement that meets both of the following~~
13 ~~requirements:~~

14 (A) ~~It is addressed to a recipient with whom the initiator does~~
15 ~~not have an existing business or personal relationship.~~

16 (B) ~~It is not sent at the request of or with the express consent of~~
17 ~~the recipient.~~

18 (3) ~~“Electronic mail service provider” means any business or~~
19 ~~organization qualified to do business in California that provides~~
20 ~~registered users the ability to send or receive electronic mail~~
21 ~~through equipment located in this state and that is an intermediary~~
22 ~~in sending or receiving electronic mail.~~

23 (4) ~~“Initiation” of an unsolicited electronic mail~~
24 ~~advertisement refers to the action by the initial sender of the~~
25 ~~electronic mail advertisement. It does not refer to the actions of~~
26 ~~any intervening electronic mail service provider that may handle~~
27 ~~or retransmit the electronic message.~~

28 (5) ~~“Registered user” means any individual, corporation, or~~
29 ~~other entity that maintains an electronic mail address with an~~
30 ~~electronic mail service provider.~~

31 (b) ~~No registered user of an electronic mail service provider~~
32 ~~shall use or cause to be used that electronic mail service provider’s~~
33 ~~equipment located in this state in violation of that electronic mail~~
34 ~~service provider’s policy prohibiting or restricting the use of its~~
35 ~~service or equipment for the initiation of unsolicited electronic~~
36 ~~mail advertisements.~~

37 (c) ~~No individual, corporation, or other entity shall use or cause~~
38 ~~to be used, by initiating an unsolicited electronic mail~~
39 ~~advertisement, an electronic mail service provider’s equipment~~
40 ~~located in this state in violation of that electronic mail service~~

1 ~~provider's policy prohibiting or restricting the use of its equipment~~
2 ~~to deliver unsolicited electronic mail advertisements to its~~
3 ~~registered users.~~

4 ~~(d)~~ *The definitions set forth in subdivision (a) of Section 17529*
5 *apply to this section.*

6 *(b) No person shall use a computer, computer network, or the*
7 *computer services of an electronic service provider to initiate the*
8 *transmission of an unsolicited commercial e-mail advertisement*
9 *from California or to a California electronic mail address in*
10 *contravention of the policies established by an electronic mail*
11 *service provider if the electronic mail service provider has*
12 *provided the person with notice of those policies. For the purpose*
13 *of this subdivision, notice of the electronic mail service provider's*
14 *policies regarding the transmission of unsolicited commercial*
15 *e-mail advertisements shall be deemed sufficient if the electronic*
16 *mail service provider maintains an accessible web page setting*
17 *forth those policies and provides notice via electronic means*
18 *between the sending and receiving computers.*

19 *(c) An electronic mail service provider shall not be required to*
20 *create a policy prohibiting or restricting the use of its equipment*
21 *for the initiation or delivery of unsolicited ~~electronic mail~~*
22 *commercial e-mail advertisements.*

23 ~~(e)~~

24 *(d) Nothing in this section shall be construed to limit or restrict*
25 *the rights of an electronic mail service provider under Section*
26 *230(c)(1) of Title 47 of the United States Code, or any decision of*
27 *an electronic mail service provider to permit or to restrict access*
28 *to or use of its system, or any exercise of its editorial function.*

29 ~~(f)~~

30 *(e) (1) In addition to any other action available under law, any*
31 *electronic mail service provider whose policy on unsolicited*
32 *electronic mail advertisements is violated as provided in this*
33 *section may bring a civil action to recover the actual monetary loss*
34 *suffered by that provider by reason of that violation, or liquidated*
35 *damages of fifty dollars (\$50) for each electronic mail message*
36 *initiated or delivered in violation of this section, *whichever**
37 *amount is greater, up to a maximum of twenty-five thousand*
38 *dollars (\$25,000) per day, ~~whichever amount is greater.~~*

39 *(2) In any action brought pursuant to paragraph (1), the court*
40 *may award reasonable attorney's fees to a prevailing party.*

1 ~~(3) (A) In any action brought pursuant to paragraph (1), the~~
2 ~~electronic mail service provider shall be required to establish as an~~
3 ~~element of its cause of action that prior to the alleged violation, the~~
4 ~~defendant had actual notice of both of the following:~~

5 ~~(i) The electronic mail service provider's policy on unsolicited~~
6 ~~electronic mail advertising.~~

7 ~~(ii) The fact that the defendant's unsolicited electronic mail~~
8 ~~advertisements would use or cause to be used the electronic mail~~
9 ~~service provider's equipment located in this state.~~

10 ~~(B) In this regard, the Legislature finds that with rapid~~
11 ~~advances in Internet technology, and electronic mail technology in~~
12 ~~particular, Internet service providers are already experimenting~~
13 ~~with embedding policy statements directly into the software~~
14 ~~running on the computers used to provide electronic mail services~~
15 ~~in a manner that displays the policy statements every time an~~
16 ~~electronic mail delivery is requested. While the state of the~~
17 ~~technology does not support such a finding at present, the~~
18 ~~Legislature believes that, in a given case at some future date, a~~
19 ~~showing that notice was supplied via electronic means between the~~
20 ~~sending and receiving computers could be held to constitute actual~~
21 ~~notice to the sender for purposes of this paragraph.~~

22 ~~(4) A violation of this section shall not be subject to Section~~
23 ~~17534.~~

24 ~~SEC. 4.~~ Any cause of action that is in existence before the
25 effective date of this act shall not be affected by this act, but shall
26 instead be governed by the law that was in effect at the time the
27 cause of action arose.

28 ~~SEC. 4.~~

29 ~~SEC. 5.~~ No reimbursement is required by this act pursuant to
30 Section 6 of Article XIII B of the California Constitution because
31 the only costs that may be incurred by a local agency or school
32 district will be incurred because this act creates a new crime or
33 infraction, eliminates a crime or infraction, or changes the penalty
34 for a crime or infraction, within the meaning of Section 17556 of
35 the Government Code, or changes the definition of a crime within
36 the meaning of Section 6 of Article XIII B of the California
37 Constitution.